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Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN ASHCROFT,
Attorney General of the United States,

Petitioner,

v.

THE AMERICAN CIVIL LIBERTIES UNION, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* DUPAGE COUNTY, ILLINOIS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The County of DuPage, Illinois, consists of approximately 332 square miles located approximately 30 miles west of Chicago. DuPage County is the second largest county in Illinois.

With nearly one million residents, the County of DuPage has an active school system. There are 241 public schools in DuPage County, comprised of 164 elementary schools, 36 middle schools, 17 junior high schools and 24 high schools. In this school system, the parents, teachers, administrators and school support personnel of DuPage County educate, train, mentor and advise nearly 200,000 children each year.

The parents, teachers, school officials and prosecutors of DuPage County, Illinois have a substantial interest in the issue of whether federal, state and local governments may restrict the time, place and manner that vendors of sexually explicit materials may peddle their products. Thus, the rights of federal, state and local units of government to take reasonable and necessary measures to ensure the health and safety and welfare of society's children is of profound concern to the *Amicus Curiae*.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this brief. Consent has been obtained from all parties pursuant to United States Supreme Court Rules to *Amicus Curiae* filing this brief. The consent letters have been submitted with this brief.

SUMMARY OF ARGUMENT

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Children are the foundation of this nation. They are our future and our destiny. In order to preserve our own futures and the future of our nation, and the countless communities scattered across the United States, a commitment to the health and well being of our nation's children is necessary to achieve these goals. We are, as a community of people, duty bound to take certain measures to protect the minds as well as the bodies of children from harm. The psychological health and well being of our nation's children are among the nation's greatest treasures. These treasures will serve as the genesis for the development of future technology. From these treasures new medicines will be discovered, new art will be composed, new inventions will be created, and new generations will form.

Children are dependant upon society's adults to protect them from harm. They alone are incapable of making decisions regarding their own health and safety. A child's psyche is fragile, and requires protection, nurturing and care.

The relief sought by Respondents, if granted by this Court, will undermine federal, state and local governments across this nation in their efforts to take reasonable and necessary measures to protect the health, safety and welfare of children. The relief sought by Respondents in

this case, if granted by this Court, may deprive society of a major tool by which it can directly address concrete risks of harm to the minds and bodies of society's children.

The Child Online Protection Act (COPA) makes it unlawful for any person to make any communication for commercial purposes by means of the Internet and that is available to minors that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. § 1(a)(1) and (c)(1) (Supp. IV 1998). COPA's scope is limited to commercial communications. COPA imposes restrictions only in limited and narrow areas where a business entity's commercial speech could impact and could affect children.

Said another way, COPA commands vendors of sexually explicit materials to install safety measures and to provide guarantees that children may not access web sites containing sexually explicit materials. COPA mandates that commercial businesses bear the responsibility to ensure that their products do not end up in the hands of minors to whom their products could not otherwise be legally sold.

COPA does not interfere with an adult's ability to purchase materials with mature themes and adult content if they so choose. COPA does not restrict the peddling of sexually explicit materials in lawful transactions to adults. To the contrary, COPA solely requires vendors of sexually explicit materials to take reasonable steps to ensure that their sexually explicit materials are not improperly

disseminated to an audience that the law does not permit these vendors to approach. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*[2], and therefore should be held to meet constitutional protections otherwise afforded to commercial speech.

The Respondents seek the benefit of unfettered discretion to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, Respondents' rights to seek and attain corporate profits from the sales of sexually explicit materials will supercede the rights of parents, teachers, principals, school boards, prosecutors and others acting in *parens patrie*, to create safe harbors where children are safe from the devastating effects of sexually explicit materials.

The Respondents further seek to attain First Amendment protections for sexually explicit advertising not previously afforded to any other category of speech, whether political or commercial. This new level of absolute immunity from federal, state or local state regulation sought by Respondents is unprecedented.

The *Amicus Curiae* respectfully asks this Court to rule that commercial speech can be restricted where the interest of children are at stake and that the rights of commercial Internet vendors peddling sexually explicit materials is not absolute under the First Amendment of our nation's Constitution.

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[2] *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989).

ARGUMENT

I. THE DANGERS FACING OUR NATION'S CHILDREN FROM COMMERCIAL PEDDLERS OF PORNOGRAPHIC MATERIALS JUSTIFY THIS COURT'S ENFORCEMENT OF THE CHILD ONLINE PROTECTION ACT.

Limiting a child's access to pornographic materials is an issue of paramount importance to this country. Internet pornography presents a terrible dilemma for parents, teachers, librarians and others acting in a *parens patrie* capacity who are responsible for other people's children, when children are online.

The impact the Internet has made and will make on children in the United States is immeasurable. Most children do not know what life was like in this country without personal computers and the Internet. According to a year 2000 survey by the United States Census Bureau, nearly 60 percent of school-age children have access to the Internet at home and at school.

It is a reality in today's society that many parents' technological sophistication does not measure up to that of their children when it comes to computer and Internet use. Parents' and guardians' lack of computer skills and Internet savvy places them at a significant disadvantage when attempting to protect their children from dangers posed by Internet access. Because the Internet fails to distinguish between adults and children, parents and guardians are faced with a daily struggle to protect their children from inappropriate materials on this global, interactive, and anonymous medium. Because the Internet has a high profile in society and because of the ease at which it can be accessed, parents and guardians are faced with a real and

major challenge to protect their children in this environment.

It is obvious that no one single approach will suffice to protect children from pornography. The efforts and influence of many parties will be required to control where children go, what they see, to whom they talk, and what they do when online. This multi-level effort already has taken root across the nation in the numerous social and educational strategies that have been implemented to date that work to teach children about online dangers.

In addition to educational initiatives implemented by parents, guardians, schools and libraries, technology and public policy have important roles to play as well. Technology-based tools, such as filters and firewalls, provide added options to protect children and in certain circumstances have proven to be effective. However, these technologies are inherently imperfect because they may permit inappropriate materials to still be accessed. Despite parents' and legal guardians' best efforts to prevent children from accessing such materials, many pornographic sights are often given common or innocuous names and are often accessed unintentionally.[3] Parents' and guardians' efforts to filter out or to otherwise limit access to such sites must still be performed on a "one at a time" basis still will likely fail to filter or limit access to adult content web sites entirely.

[3] For example, the website www.whitehouse.com does not provide a link to the home of the President of the United States, but actually links the computer user to a web site that provides adult content materials.

These problems posed a child's access to adult content web sites on the Internet have been widely documented. A number of efforts have been undertaken to address this issue. Many pieces of legislation in addition to COPA have been proposed by various people and organizations. One example is the Protecting Children from Peer to Peer Pornography Act ("P4 Act"). The P4 Act, proposed by Congressman Joseph Pitts, is an effort to arm parents with the tools they need to protect their children from pornography and threats to privacy posed by peer-to-peer file trading networks. In support of this proposed legislation, Congressman Pitts was quoted in an on line press release as stating:

> Millions of people are using peer-to-peer software at any given time. About forty percent of them are children. . . . Unfortunately, pedophiles and pornographers use these networks to distribute pornography . . . a child . . . can type in an innocent key word and inadvertently download pornography.

In the year 2000, Florida lawmakers also took aim at the issue of pornography and computers by creating a legal foundation for mandatory third-party reporting of child pornography stored on computers and by targeting sexual predators' use of the Internet to expose themselves to minors. One proposed bill, HB 895, required any person who "knows, or has reasonable cause to believe, that a computer contains images of child pornography" to make a report to law enforcement officials. The bill provided civil immunity from making such reports and created a second-degree misdemeanor penalty for failing to make a report. The second proposed bill, HB 683, focused on making activities electronic exhibitionists. The bill targeted any

person who intentionally committed various sexual acts or simulated any act involving sexual activity "live over a computer online service, Internet service or local bulletin board service and who knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age."

Law enforcement officials and prosecutors across the nation, such as those employed by the *Amicus Curiae*, are engaged in daily efforts to combat the health and safety threat to children created by access to pornographic web sites. This effort has required and will in the future require the dedication of substantial governmental resources. According to the San Diego, CA District Attorney's office[4]:

(1) Internet crime is the fastest growing crime in the U.S., and children are the fastest growing victim pool.

(2) In the U.S., 95% of schools are now connected to the Internet.

(3) Over 45 million children ages 10 through 17 use the Internet. Among them:

(a) One in five has been sexually solicited.

(b) One in four has encountered unwanted pornography.

[4] http://www.co.san-diego.ca.us.

(4) Close to 60% of teens have received an e-mail or instant message from a stranger and half have communicated back.

(5) Over 75% of Internet crimes involving sexual solicitations of children and exposure to unwanted pornography is not reported to police or parents.

Many parents do not supervise their children's Internet use. Some startling statistics provided by the San Diego County District Attorney's Office[5] report on the status of parental involvement in today's society:

(1) An estimated 20% of parents do not supervise their children's Internet use at all.

(2) Only 52% of parents moderately supervise their children's Internet use.

(3) Some 71% of parents stop supervising Internet use by their children after the age of 14, yet 72% of all Internet-related missing children cases involve children who are 15 years of age or older.

(4) Close to 62% of teens say their parents know little or nothing about the web sites they visit.

Simply put, parents can not assume full responsibility for monitoring their children's on-line activities, especially when a substantial amount of the time children spend on line is when they are at school, at libraries, or at their friends' homes. Parents cannot simply be everywhere at all times. The responsibility, at least a portion thereof, to protect children in this context must lie with the commercial vendors or pornographic materials.

[5] http://www.co.san-diego.ca.us.

The concern over children accessing pornographic materials is not limited to parents and prosecutors in DuPage and San Diego counties. This issue is of a national concern and has resonated with our nation's leaders. On October 25, 2003, President George W. Bush raised further awareness of the need to protect children from pornography, both in printed and electronic forms by proclaiming that October 26, 2003 through November 1, 2003 to be National "Protection From Pornography Week".

In this proclamation, President Bush underscored the substantial pain, suffering and damage pornography can cause to families, children and communities. President Bush described federal initiatives to combat the dangers facing children from pornography. These initiatives include the allocation of substantial federal resources to the Department of Justice to intensify investigative and prosecutorial efforts to combat obscenity, child pornography, and child sexual exploitation on the Internet. This case is evidence of the ongoing efforts by the President and the Department of Justice in this regard.

This proclamation by President George W. Bush states:

> Pornography can have debilitating effects on communities, marriages, families, and children. During Protection From Pornography Week, we commit to take steps to confront the dangers of pornography.
>
> The effects of pornography are particularly pernicious with respect to children. The recent enactment of the PROTECT Act of 2003 strengthens child pornography laws, establishes the Federal Government's role in the AMBER Alert System, increases punishment for Federal

crimes against children, and authorizes judges to require extended supervision of sex offenders who are released from prison.

We have committed significant resources to the Department of Justice to intensify investigative and prosecutorial efforts to combat obscenity, child pornography, and child sexual exploitation on the Internet. We are vigorously prosecuting and severely punishing those who would harm our children. Last July, the Department of Homeland Security launched Operation Predator, an initiative to help identify child predators, rescue children depicted in child pornography, and prosecute those responsible for making and distributing child pornography.

Last year, I signed legislation creating the Dot Kids domain, a child-friendly zone on the Internet. The sites on this domain are monitored for content and safety, offering parents assurances that their children are learning in a healthy environment. Working together with law enforcement officials, parents, and other caregivers, we are making progress in protecting our children from pornography.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim October 26 through November 1, 2003, as Protection From Pornography Week. I call upon public officials, law enforcement officers, parents, and all the people of the United States to observe this week with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fourth day of October, in the year of our Lord two thousand three, and of the Independence of the United States of America the two hundred and twenty-eighth.

GEORGE W. BUSH

COPA is a vehicle that will ensure that commercial sellers of pornographic materials will take action to ensure that pornographic materials distributed in the course of their businesses will be restricted from the view of minors. COPA further ensures that sites containing adult content will be separated from sites that are appropriate for viewing by our nation's youth.

Parents, guardians, schools, libraries and government are all working to protect children from dangers on the Internet created by commercial pornographers. The commercial pornography industry has an equal, if not greater, responsibility to account for the whereabouts of its products and wares. COPA shifts the responsibility for protecting minors from pornography to an appropriate place – to businesses that generate *financial profits* from the sale and distribution of pornographic materials.

This Court should not afford business entities a license to ignore overwhelming data that minors are frequently and regularly gaining unfettered access to their pornographic materials. The Constitution should not be applied in a manner to sanction the pornographic industry's unwillingness to take responsibility to protect children in this nation from viewing pornographic materials. The pornographic industry can and should be required to implement technology that is currently technologically and

economically feasible that can prevent minors from accessing pornographic materials. In the event that taking such measures causes an increase in these commercial entities' operating costs, those costs should be dealt with in the same manner that any other business entity deals with overhead or compliance costs related to the business venture. Because all commercial vendors of pornographic materials would be required to comply with COPA's requirements, no one vendor would be afforded a competitive advantage over another.

The potential dangers to our nation's children are far too great to be afforded a second place priority to the purported "commercial speech" interests of commercial pornographers. The mental and physical health of our nation's children should remain first and foremost under the law and in our society. The nation's prosecutors must be afforded proper tools to protect children's health and safety, and COPA provides these prosecutors with the appropriate tools. To rule in favor of Respondents in this case, respectfully, threatens to jeopardize local prosecutors' efforts to protect the children in their communities from the unrestricted distribution of pornographic materials on the Internet. Accordingly, the *Amicus Curiae* respectfully requests that this Court enter an order in favor of Petitioner.

II. CONGRESS MAY RESTRICT COMMERCIAL SPEECH ON THE INTERNET TO PROTECT THE HEALTH AND SAFETY OF OUR NATION'S CHILDREN.

A. The Health Of Children Constitutes a "Substantial Interest" Which Clearly Justifies Congress' Right To Commercial Speech On The Internet.

This Court has consistently recognized that a government may act more protectively where children are concerned. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). The law is well settled that a legislature can adopt more stringent controls on communicative materials available to children than on those available to adults. *Erznoznik*, 422 U.S. at 212. Children deserve special solitude in the First Amendment balance because they lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

This Court has long been a champion of protecting children's health and welfare in numerous cases where the interests of children were balanced against commercial free speech interests. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court approved extra restrictions on speech on the radio because of the pervasiveness of the medium and the presence of children in the audience. In *Ginsburg v. New York*, 390 U.S. 629 (1968), this Court sustained a law which protected children from non-obscene literature. And while this Court has acknowledged a right to private possession of mature entertainment materials in private residences, *see generally, Stanley v. Georgia*, 394 U.S. 557, 566 (1969), this Court has allowed

stringent legislative responses to "destroy a market for the exploitative use of children." *Osbourne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

This Court long ago underscored the importance of the underlying reason for the special solitude of children in the First Amendment balance:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This Court has afforded children this special safeguard to ensure that children do not become lost in the marketplace of ideas. *See generally, Anheuser-Busch*, 101 F.3d at 330.

More recently, this Court reiterated the position it has taken in prior cases permitting the balance of First Amendment rights to be tipped in favor of the health of children. In *Osbourne v. Ohio*, 495 U.S. 103 (1990), this Court stated:

> It is evident beyond the need for elaboration that [the government's] interest in safeguarding the physical and psychological well-being of a minor is compelling. . . .

The potential ramifications of the instant case pose a real threat to the healthy, well-rounded growth of society's children. This threat has been well documented. Mr. J. Robert Flores, Vice President for the National Law Center for Children and Families, stated to Congress' Committee on Commerce (Subcommittee on Telecommunications, Trade and Consumer Protection) at a hearing on Obscene Material Available on the Internet, that sexually explicit

materials pose a real and significant threat to our nation's youth:

> Does this threaten children? You better believe it does. Our kids and grand-kids see it and become indoctrinated by it.

Statement of J. Robert Flores, Esq., Vice President and Senior Counsel, National Law Center for Children and Families before the Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, Hearing on: Obscene Material Available Via The Internet (May 23, 2000). Mr. Flores elaborated on the increased effort that vendors use to market sexually explicit materials over the Internet:

> The pornography industry has also become among the most aggressive marketers on the Internet, using newly developed "push" technologies . . . [T]hus, even if it were true, and I doubt it, that only those who sought out obscenity could find it, today only a lucky few are able to avoid it, as the Internet user community is bombarded with advertisements, tricked into visiting sites, given hot links to porn when search engines are asked for innocent sites, sent unsolicited porn spam e-mails, and trapped in endless mousetraps that bounce them from porn site to porn site when they try to leave.

Id. Our nation's children are not immune from the situation described by Mr. Flores in his statement. The Thursday, October 7, 1999 edition of *The Florida Times Union* reported that 91 percent of teenagers responding to a

survey responded that they have stumbled across an Internet web site that their parents would find objectionable.[6]

A March 28, 2000 survey commissioned by the National School Boards Association (NSBA) and supported by the Children's Television Workshop and Microsoft, reported one of parents' top concerns about their children using the Internet was the possibility that their children will encounter pornography. According to this survey, 78 percent of children ages 13 to 17 said they use the Internet when they are alone.

There is a real threat to our nation's children posed by the inordinate amount of information, and sexually explicit materials, available to anyone with a computer and a connection to the Internet. The vast majority of children clearly are using the Internet alone, and virtually all of these children have been exposed to objectionable material during their travels down this "information superhighway." Children lack the cognitive skills to assess and analyze fully the information presented through commercial advertisements. *See generally, Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329-30 (4th Cir. 1996).

Congress enacted COPA as a response to the need to protect the nation's children from the dangers they may encounter on the Internet. The serious impact of sexually explicit material on our nation's children clearly supported COPA's enactment. The impact that sexually explicit

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[6] This survey, published by the Safe America Foundation and Yankelovich Partners, Inc., surveyed 502 parents and 503 teens on Internet issues in August 1999.

materials have on children in this nation clearly supports a balancing of First Amendment rights by this Court to affirm COPA's validity and enforceability.

B. The First Amendment Is Not Absolute And Thus The Peddling of Sexually Explicit Materials On The Internet Is Not Immune From Regulation.

Since this Court rendered its decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), commercial speech has been afforded some level of protection under the First Amendment from unwarranted governmental interference. Respondents' arguments in essence are an attempt to expand this Court's ruling in the *Virginia Pharmacy Board* case to such a degree that the communication of all sexually explicit materials on the Internet will be virtually immune from any and all regulation. Said another way, Respondents' arguments, if successful, will elevate the peddling of sexually explicit materials on the Internet to a degree that it is afforded the same constitutional protections that are traditionally afforded to political speech. The Respondents' positions are contrary to the letter and spirit of prior decisions made by this Court and should be flatly rejected.

This Court has long afforded substantial constitutional protection only to true political speech where, unlike the peddling of sexually explicit materials on the Internet, profit is not the central motive. In fact, in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) this Court laid the foundation for the exclusion of sexually explicit materials from the realm of constitutionally protected expression. *See generally*, *New York v. Ferber*, 458 U.S. 747 (1982). There, this Court clearly established that the act of

peddling sexually explicit materials is not afforded absolute protection under the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky, 315 U.S. at 571-572 (footnotes omitted). Consistent with its decision in *Chaplinsky*, this Court squarely held in *Roth v. United States*, 354 U.S. 476 (1957) that "obscenity is not within the area of constitutionally protected speech. . . ." In *Chaplinsky*, this Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment:

> The original States provided for the prosecution of libel, blasphemy, and profanity, and the universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956.

New York v. Ferber, 458 U.S. 754 (footnotes omitted).

There are many examples where this Court has held numerous types of non-commercial speech are afforded First Amendment protections. For example, this Court has long held that the First Amendment shields such acts as saluting the flag as well as refusing to do so. *West Virginia*

Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943). The First Amendment shields an individual's right to wear an armband to protest a war. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969). This Court has held that displaying a red flag is also protected under the First Amendment, *Stromberg v. California*, 283 U.S. 359, 369 (1931), as well as "marching, walking or parading" in uniforms displaying the swastika. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). The speech in each of these cases sought to advance traditional notions of political thought, protest and societal change.

However, this Court has also ruled that even true political speech is not immune from governmental restriction. This Court has refused to extend unlimited First Amendment protection to all forms of political speech even though this nation treasures political speech as the cornerstone of its democracy. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the legislative branch's limitations on campaign contributions. This Court reasoned that the potential for corruption and the avoidance of the appearance of improper influence was a sufficiently important concern to justify legislative limitations on campaign contributions. Similarly, in *Nixon, Attorney General of Missouri, et al. v. Shrink Missouri Government PAC, et al.*, 528 U.S. 377 (2000), this Court again upheld as constitutional state limitations on campaign contributions despite the political nature of the donations. This Court reasoned that the danger of corruption in the electoral system is a sufficient state interest to uphold limitations placed on campaign contributions.

It is important to note that this Court has regularly restricted other forms of speech where profit was not the

central motive and where the speaker asserted that their speech was, in a broad sense, an "exchange of ideas." In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court ruled that fighting words fall beyond the scope of the First Amendment. In *Beauharmais v. Illinois*, 343 U.S. 250 (1952), this Court ruled that group libel is not afforded protection under the First Amendment. Similarly, in *FCC, supra,* 438 U.S. at 726, this Court denied constitutional protection to indecent speech. A similar conclusion was reached by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) with regard to defamatory falsehood.

This Court has recognized that commercial speech, like the commercial peddling of sexually explicit materials on the Internet, may be restricted in certain circumstances because commercial speech is not afforded the same, heightened level of protection under the First Amendment traditionally given to political speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978). This Court has recognized the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ohralik*, 436 U.S. at 455-456.

In this case, the Respondents seek a judicial license to peddle sexually explicit materials wherever and whenever they please. If successful in their argument, Respondents' rights to seek and attain corporate profits from the sale of sexually explicit materials will supercede the rights of parents, teachers, principals, and those acting in *parens patriae* of children to create a safe harbor where children can be safe from the devastating effects of sexually explicit materials.

C. Congress' Restrictions On The Peddling Of Sexually Explicit Materials Pass Constitutional Muster Because They Have A Reasonable Relation To The Goal Of Protecting Children's Health.

Once a legislature has identified a substantial interest that supercedes the First Amendment protections afforded to commercial speech, the legislature is not required to employ the least restrictive means to promote that substantial interest. *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989). Here, the legislature has established that the health and safety of children are substantial interests that supercede any First Amendment protection that Internet advertisers may have otherwise had in the absence of these substantial interests.

The legislature is not required to seek out and use the least restrictive means available to protect children from the negative effects of exposure to sexually explicit materials. Respondents have suggested that the legislature is required, or should be required, to apply the least restrictive means test when restricting commercial speech. The *Amicus Curiae* acknowledges that this Court, in dicta in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), suggested that the least restrictive means test be applied in commercial speech cases. However, this Court did not adopt the least restrictive means test in its holding in *Central Hudson*. Furthermore, this Court has not adopted the use of the least restrictive means test in any subsequent commercial speech case. To the contrary, this Court has specifically held that the least restrictive means test is not required in all commercial speech cases. *Fox, supra*.

Justice Scalia, writing for the Court in *Fox*, emphasized that commercial speech is afforded lesser protection in the spectrum of First Amendment protections. *Id.* Therefore, Justice Scalia concluded that to apply the least restrictive means test would raise commercial speech to a higher level of First Amendment protection than has been previously afforded by this Court. *Id.* Justice Scalia stated:

> In sum, while we have insisted that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," . . . we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in other contexts . . . a means narrowly tailored to achieve the desired objective. Within these bounds we leave it to governmental decision-makers to judge what manner of regulation may be best employed.

Id., citing, Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) *and citing In re R.M.J.*, 455 U.S. 191 (1982).

The legislature is not required to use the absolute least restrictive means that guarantees in each and every

circumstance that children, and children only, will be insulated from the adverse effects of sexually explicit materials. The legislature is required only to demonstrate that its restrictions on the peddling of sexually explicit materials on the Internet is *reasonably related* to the goal of protecting children's health and that its restrictions are narrowly tailored to achieve that purpose.

The regulations at issue here clearly satisfy this Court's test. The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the Internet that is available to minors and that includes material that is "harmful to minors" unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. § 231(a)(1) and (c)(1) (Supp. IV 1998). COPA imposes restrictions only in those limited areas where the commercial speech affects children. These regulations do not restrict or in any way bar the peddling of sexually explicit materials through lawful transactions to adults. COPA clearly satisfies this Court's "reasonableness" test as set forth in *Fox*, and therefore should be upheld by this Court.

CONCLUSION

The *Amicus Curiae* County of DuPage, Illinois respectfully requests that this Court rule in favor of Petitioner John Ashcroft, Attorney General of the United States.

Respectfully submitted,

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